MEMORANDUM FOR: Acting Director of Central Intelligence

SUBJECT: Protection of Intelligence Information -- Legislative Proposal

For almost two years the Committee has been wrestling with the problem of giving effective protection to intelligence information, particularly with respect to unauthorized disclosure.

The idea behind this draft proposal stems from the inherent difficulties in prosecution for unauthorized disclosure under the United States espionage laws. The Gorin case, decided by the Supreme Court in 1940, has been interpreted through the years as requiring in the prosecution of espionage cases proof that the information divulged was "to be used to the injury of the United States or to the advantage of a foreign nation" and the disclosure of the matter sought to be protected during the trial because under the Gorin case the jury must decide whether the information is related to the national defense and security. It is obvious that in the protection of classified information from unauthorized disclosure the prosecution under the Espionage Act must be limited to those cases where the evidence on intent is clear and the divulging of the information in an open court is not detrimental.

These difficulties have been apparent for many years, and as early as 1946 efforts within the Government were initiated to amend the espionage laws so that adequate protection of classified information could be effected. These efforts have led to some changes. Unfortunately, however, no changes have been made which would ease the burden of the Government in the prosecution of espionage cases in overcoming the Gorin doctrine. One of the suggestions most often made to ease this burden has been to adopt legislation similar to the British Official Secrets Act. Studies have been made on this suggestion, but no formal presentation has been made because of the basic incompatibility of the British Official Secrets Act to the United States Constitution. On the other hand, there are a number of lawyers who believe that adequate protection cannot be given to classified information under existing legislation because, as they put it, criminal procedure demands that information which a defendant is accused of disclosing must be presented in open court. Nevertheless, this Office has been working on the problem with an eye toward approval by the Congress of legislation specifically aimed at the protection of intelligence information. Consideration has been given to the argument

that any legislative proposal will be criticized on the usual grounds of a threat to constitutional freedoms and also to the more technical argument that classified information will still have to be presented in open court.

Our first objective is to present the problem to Congress in the form of a legislative proposal for the protection of Intelligence Data. We believe that the fact of a statute for the protection of Intelligence Data will have a considerable deterrent effect regardless of whether a case is ever prosecuted.

With this in mind, the proposal now before the Committee contains a new legislative term, Intelligence Data. Taking a hint from the restricted data category of the Atomic Energy Act, we have attempted to put into legislation a definition of intelligence information. In effect, the proposal would set intelligence apart and apply to it statutory protection. Explanation of the various sections of the proposal follow.

The full force of the draft proposal occurs in Paragraph 2. First, the statute is made applicable to present or former employees of the Government, members of the armed forces, or contractors. Second, the proposal sets down as one of the elements that the person knowingly disclose Intelligence Data to a person not entitled to receive Intelligence Data; the theory being that under this particular wording the fact that divulged information was classified Intelligence Data would be all that would be necessary to prove in open court. In effect, it would substitute the judgment of the Director of Central Intelligence for that of the jury. Limiting the proposal so that it applies only to employees and former employees was suggested for two reasons: (1) the employee or the former employee is the source of leaks of classified information, and (2) it lessens the impact of the argument that this type of legislation is a step toward censorship and infringes upon the freedom of the press. To use a broader category, such as anyone who divulges classified information, would make the prosecution of reporters a possibility but would also engender a great deal of pressure against the passage of such legislation. Paragraph 3 would make an attempt to disclose a violation.

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Paragraph 4 provides for regulations implementing the statute to be promulgated by each agency responsible for the protection of Intelligence Data and also provides for Presidential approval for the purpose of uniformity. At the insistence of the FBI, provision is made in this section for each agency to investigate violations occurring within that agency.

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